Supreme Court, U.S.
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No. 02-91

In The

Supreme Court of the United States

RONALD I. WEISS, Executor and Trustee
for WALTER L. ABT,

Petitioner,

v.

ST. PAUL FIRE & MARINE INSURANCE CO.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the District Court properly granted, and the Circuit Court properly affirmed, a motion to vacate a default judgment, when the default was not the result of culpable conduct and the failure to timely file an answer resulted from an honest mistake, Defendant had a meritorious defense, Plaintiff would not be prejudiced by the vacation of the default judgment and the Defendant moved to vacate immediately upon discovering default as the motion was filed less than thirty (30) days after the date the answer to the complaint was due? Additionally, the Trial Court and Circuit Court found Plaintiff's arguments for default were disingenuous as Plaintiff's attorneys had been in frequent touch with Defendant's attorneys prior to initiation of the suit, but elected not to notify them of the filing of the lawsuit, the entry of default or the default judgment.

2. Where the District Court and Circuit Court properly apply the substantive law of Ohio to the interpretation of insurance contracts, concluding that the contract is unambiguous and does not require any duty to defend or indemnify by the insurance company, should a petition in this Court be sanctioned which argues anew that the insurance contract is ambiguous by argument that the Circuit Court created its own "common law," when such is not the case?

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STATEMENT OF THE CASE

A. INTRODUCTION

On August 25, 1992, Walter B. Abt, now deceased ("Abt"), filed a declaratory judgment action in District Court against St. Paul Fire & Marine Insurance Co. ("St. Paul"). Abt was Assignee of the rights of Mor-Flo Industries, Inc. ("Mor-Flo"). The Complaint sought declaratory judgment relief, and requested declarations of the rights of Mor-Flo and St. Paul's obligations under applicable insurance policies issued to Mor-Flo. The Complaint, in pertinent part, sought declaratory relief and also damages, along with attorney fees, costs and interest from the date of judgment in a lawsuit filed in the United States District Court for the Eastern District of Tennessee on July 18, 1984, against Mor-Flo by one of its principal competitors, State Industries, Inc. ("State").

1. The Business of Mor-Flo Industries

Mor-Flo, founded in Cleveland in the early 1930's, was one of the sixth or seventh largest water heater manufacturers in the United States by 1984. Its President and Chief Executive Officer was Abt.

One of Mor-Flo's principal competitors was State. On December 10, 1979, State applied for a U.S. Patent No. 4,447,377 on its process for making a foam insulated water heater where liquid foam was shot into a plastic envelope which was wrapped around the water tank in the space between the tank and the sheet metal jacket.

In 1979, Mor-Flo became aware of State's foam insulated water heater and it tried to develop its own method of foam insulation. Abt insisted that Mor-Flo's engineering

staff develop a process for making foam insulated heaters. In early 1980, Mor-Flo purchased one of State's foam insulated water heaters in order to tear it down and see how it worked. After observation of State's envelope, Mor-Flo came up with a strikingly similar foam containing configuration. See *State Industries, Inc. v. Mor-Flor Industries, Inc.*, 639 F.Supp. 937, 943-944 (E.D. Tenn. 1986).

2. The Patent Infringement Litigation

In July, 1984, State sued Mor-Flo for patent infringement in the United States District Court for the Eastern District of Tennessee. On May 29, 1986, the District Court found that State's patent was valid and had been infringed by Mor-Flo. *State Industries, Inc. v. Mor-Flo Industries, Inc.*, 8 U.S. P.Q. 2d 1971, 1972 (E.D. Tenn. 1988).

3. Subsequent Proceedings in the Patent Litigation

The District Court held a hearing for determination of damages in May, 1988 and rendered its judgment in July, 1988. It awarded $6,873,262.00 for lost profits and royalties and $2,110,409.00 in prejudgment interest from May 8, 1984 to July 21, 1988. Total damages were thus $8,884,671.00. The Court denied an allowance for attorney fees and declined to award exemplary damages. *Id.*

The Court of Appeals for the Federal Circuit Court affirmed the damages awarded but remanded the case to the District Court to reconsider whether a finding of willful infringement would be justified. *State Industries, Inc. v. Mor-Flo Industries, Inc.*, 883 F.2d 1573 (Fed. Cir.

1989). This Court denied *certiorari*, 493 U.S. 1022, 107 L. Ed.2d 744 (1990).

Following remand, the District Court determined that there was no willful infringement and treble damages were not justified. *State Industries v. Mor-Flo*, 17 U.S. P.Q. 2d 774 (1990).

4. Mor-Flo's Coverage With St. Paul

In 1984, St. Paul provided coverage to Mor-Flo under three policies: a Comprehensive General Liability policy the ("CGL policy"), an Umbrella Excess Liability policy, and a Directors and Officers Liability policy.

Although three policies were in effect during 1984, only the CGL and excess policies are applicable. They are the only policies under which Abt claims any rights. (Complaint, ¶¶ 7-10, 22, 25-51, 32.)

A. CGL Policy

The CGL Policy in effect during 1984 contained a "General Liability Broadening Endorsement" which was St. Paul's "plain English" version of a coverage form developed by the Insurance Services Office. The General Liability Endorsement in the 1984 policy states that "this endorsement only applies to *accidental* events or inferences with someone's rights that happen while this endorsement is in effect." (Italics supplied) It further states:

> "We'll pay amount you . . . are legally required to pay as damages for covered personal injury or advertising injury claims resulting from your business activities.

* * *

Advertising injury means any of the following types of inference with someone's rights *resulting from any advertisement, advertising or publicity article, broadcast or telecast.* (Italics supplied)

- Libel, slander or defamation.
- Violation of the right of privacy.
- Piracy.
- Unfair competition.
- Infringement of copyright, title or slogan."

The term "**accidental event**" is defined as "*any event that results in bodily injury or property damage that the protected person didn't expect or intend to happen.*" (R.98, St. Paul's CGL Policy Apx. pg. 1304.)

B. The Excess Policy

St. Paul's Umbrella Excess Liability Policy provided in material part:

"**I. Coverage**

The Company will indemnify the Insured for all sums which the Insured shall become legally obligated to pay as damages . . . on account of: * * *

(3) Advertising Offense, to which this Policy applies, caused by an occurrence."

The term "Advertising Offense" was defined as:

(1) libel, slander or defamation;

(2) any infringement of copyright or of title or of slogan;

(3) piracy or unfair competition or idea misappropriation under an implied contract;

(4) any invasion or right of privacy; committed or alleged to have committed in any advertisement, publicity article, broadcast or telecast and arising out of the Named Insured's advertising activities."

The term "Occurrence" was defined as:

* * *

(3) with respect to advertising offense, an act or series of acts in which the same or similar advertising material is used, regardless of the number or kind of media used, committed during this policy period."

(R.98, St. Paul's "Excess Policy," Apx. pg. 1313.)

5. Mor-Flo's Assignment of Its Insurance Claim to Walter Abt

In March, 1992, Mor-Flo was negotiating with SABH (U.S.), Inc. and its subsidiary, MMP Holdings, Inc., with the objective of merging Mor-Flo into MMP Holdings, Inc. Each shareholder of Mor-Flo would receive cash in exchange for common stock. In the negotiation of the merger, SABH declined to assign any value to Mor-Flo's claim against St. Paul. SABH agreed that Mor-Flo could assign its rights against St. Paul to Abt without causing any loss of consideration to Mor-Flo's shareholders. The Board of Directors of Mor-Flo approved the assignment to Abt on March 18, 1992. The consideration was $1,000. Abt, as assignee, was authorized in his sole discretion to take any action he deemed advisable without any obligation to share any recovery with SABH. (R.98, Abt Deposition, Exhibit D, Apx. pg. 1325.)

6. Default Judgment/Relief From Judgment

In February 1991, Mor-Flo spoke with its insurance agent about coverage of the judgment for State Industries and its litigation expenses. (R.1, Complaint ¶ 18, Apx. pg. 16.) On May 6, 1991, St. Paul retained John Baker ("Baker") and the firm of Weston, Hurd, Fallon, Paisley & Howley ("Weston Hurd") in Cleveland, Ohio, with regard to the Mor-Flo claim. (R.12, Motion to Vacate Default Judgment ("Motion"), Exhibit A, Baker Affidavit, ¶ 2, Apx. pg. 333.)

On May 31, 1991, Mor-Flo's counsel, Richard S. Mitchell ("Mitchell") of the Cleveland law firm of Goodman, Weiss & Freedman (the attorneys who represent Abt) called Baker to request a meeting. (*Id.*, ¶ 3, Apx. pg. 333.) Mitchell had been informed that St. Paul had referred the matter to Weston Hurd. (*Id.*)

John Baker met with Mitchell in the latter's office on June 5, 1991 to learn about the dispute from Mitchell's perspective. (*Id.*, Baker Affidavit, ¶ 4, Apx. pg. 333.) Thereafter, lawyers at Weston Hurd researched the coverage issues to provide an opinion from St. Paul. (*Id.*)

For a period of six months during the latter part of 1991, Baker had frequent correspondence with Mitchell regarding the underlying facts, the issues and the coverage. (*Id.*, Baker Affidavit, ¶ 6, Apx. pg. 333.) Mitchell and Baker exchanged correspondence on June 21, 1991, July 15, August 2, August 5, September 25, October 31 and November 15, 1991. (*Id.*, ¶ 7 and correspondence attached thereto as exhibits, Apx. pg. 333.)

During this time, St. Paul's investigation of the factual background continued, and there was an exchange

of information, documentary and otherwise, between Mitchell and Baker. (*Id.*, Baker Affidavit, ¶¶ 6 and 7, Apx. pg. 333.) Ronald I. Weiss, a partner in Mitchell's firm, was copied on that correspondence (June 21, 1991, July 15, 1991, September 25, 1991, October 31, 1991 and November 15, 1991). (*Id.*, ¶ 8, Apx. pg. 333.) Mitchell and Weiss clearly understood that John Baker and Weston Hurd represented St. Paul on the Mor-Flo Claim.

On November 7, 1991, St. Paul sent Mor-Flo a six-page letter analyzing the claims in relation to the coverages provided by its policies. (*Id.*, Baker Affidavit, ¶ 9, Apx. pg. 333.) St. Paul concluded that it, "must decline coverage of the referenced matters, the requested indemnification for underlying judgments, and attorney fees expended." A copy of that letter was directed to Mitchell, and Baker confirmed to Mitchell on November 15, 1991 that the letter was St. Paul's position on the claims. (R.12, Motion, Exhibit A, Baker Affidavit, ¶ 7, Apx. pg. 333.)

On August 25, 1992, Abt filed the Complaint in the present case. (R.1, Apx. pg. 16.) A Civil Cover Sheet was required by Northern District of Ohio Rule 2:1.1 to be filed with the Complaint, and it was signed by Richard S. Mitchell and filed on August 25, 1992. (R.12, Motion, Exhibit E, Apx. pg. 385.) It lists the identities of the Plaintiff and the Defendant and Plaintiff's attorneys – *but the box for the description of the defendant's attorneys was left entirely blank.* (*Id.*) The caption for that box states:

Attorneys (if known)

Richard Mitchell knew that John Baker and Weston Hurd were St. Paul's attorneys on this disputed matter. **It was false and misleading to imply to the Court that**

St. Paul's attorneys were not known to Plaintiff's counsel.

The Complaint alleges that, "Abt (as assignee of Mor-Flo) has suffered and continues to suffer losses and damages in an amount not yet fully ascertainable but believed to be in excess of $12.5 million." (R.1, Complaint, ¶¶ 29, 33, Apx. pg. 16.) The terms of the assignment and the nature of the consideration, if any, that Abt paid for the assignment were not described.

St. Paul received the Complaint at its home office in Minneapolis, and the Complaint was referred to Weston Hurd in Cleveland. The Weston Hurd docket department received it on September 3, 1992. (R.12, Motion, Exhibit J, Affidavit of Mary Gerlich, ¶ 4 Apx. pg. 397.) The policy of the Weston Hurd docket department was to enter an appearance when Court records established that proper service had been made. (*Id.*) Dennis Kolibab of Weston Hurd's docket department contacted the Clerk's office on September 3, 1992 and learned that the Court's files were negative for any return of service as of that date. (*Id.*, Exhibit L, Affidavit of Dennis Kolibab, ¶ 3, Apx. pg. 409.) He then established a tentative answer date of September 14, 1992. (*Id.*, ¶ 6, Apx. pg. 409.)

On September 9, Plaintiff's counsel filed a return of service, establishing that service was made on St. Paul on August 27 (R.6, Apx. pg. 299).

James Barone ("Barone"), another clerk in the docket department at Weston Hurd, was responsible for telephoning deputy clerks at the courthouse to determine answer dates in recently-filed cases. (R.12, Motion, Exhibit K. Barone Affidavit, ¶ 1, Apx. pg. 405.) A tentative date of September 14, 1992 had been established by Dennis

Kolibab. (*Id.* Exhibit L, Affidavit of Dennis Kolibab, ¶ 4, Apx. pg. 409.) The 20th day after the service on St. Paul on August 27 was September 16, 1992. One or two business days before a tentative answer date, it was Barone's practice to call the Clerk's office to determine whether a service date had been established. (*Id.* Exhibit K, Barone Affidavit, ¶ 4, Apx. pg. 405.) Barone's Affidavit states that he telephoned the Clerk's office on September 12 or 13, 1992 (Saturday and Sunday by the calendar) (*Id.*, ¶ 5, Apx. pg. 405), but this was obviously mistaken because no such calls could have been placed over the weekend. Since the tentative answer date was September 14, a Monday, it would have been consistent with his practice to call the Clerk's office on Thursday or Friday, September 9 or 10. He believes, without having an independent recollection of making a specific telephone call, that when he called he was informed by the deputy clerk that there was as yet no return service on the Defendant. (*Id.*, ¶ 5, Apx. pg. 405.) He therefore diaried the tentative answer date forward another ten days, to September 24, 1992. (*Id.*) As a result, the docket department did not seek a leave to plead by the answer date, September 16, 1992.

The following morning, September 17, 1992, Richard Mitchell appeared in the Clerk's office with his personal affidavit and a motion requesting an entry of default. (R.7, Motion for Entry of Default, Apx. pg. 300.) The deputy clerk signed it forthwith. The default was entered on the docket September 18 (R.7, Apx. pg. 300).

On the morning of Tuesday, September 22, Plaintiff Abt filed an affidavit in support of default judgment reciting that Mor-Flo had paid the judgment against it in the aggregate amount of $9,925,638 and that its legal fees and expenses were in excess of $2.5 million (R.9, Apx. pg.

313). Mitchell did not disclose those actions to John Baker or anyone else at Weston Hurd. (R.12, Motion, Exhibit A, Baker Affidavit, ¶¶ 13 and 14, Apx. pg. 333.) Neither the September 17 motion requesting the entry of default, the September 18 entry of default nor the affidavit of Mr. Abt were communicated to John Baker or Weston Hurd – even though Mitchell knew that Baker and Weston Hurd had represented St. Paul in the negotiations, discussions, and correspondence on this claim for a period of six months from May 31, 1991 through November 15, 1991. (*Id.*)

Mr. Mitchell understood that the failure of St. Paul's counsel to file an entry of appearance was clearly due to a mistake. The colloquy between District Judge White and Mr. Mitchell makes that evident. Judge White observed that it was "strange" that Plaintiff's counsel, "might not even pick up the phone and even discuss it before moving for default judgment."

> THE COURT*** I mean, didn't you think they were making a mistake?
>
> MR. MITCHELL: I have no idea whether St. Paul held it, whether Weston Hurd had it or whether they sent it to somebody else. The last contact I had with them was eight months before.
>
> THE COURT: All I am saying is, don't you think one or the other was making a mistake, and if they were being sued for that kind of money, they were making a mistake?
>
> MR. MITCHELL: Generally, but that's their obligation - -
>
> THE COURT: I know but I am asking you, don't you think somebody was making a mistake, or

were you not aware somebody hadn't then filed an answer? I am just asking you to speculate.

MR. MITCHELL: I can't say what they were thinking.

THE COURT: I am asking what you were thinking.

MR. MITCHELL: Certainly, when I file a complaint, Your Honor, I certainly expect that people will timely file.

THE COURT: I won't belabor it after this, and I am asking you based on your discussions with Mr. Baker, I guess it was in this case?

MR. MITCHELL: I could only give the same answer as I did before. When I file a complaint, I would expect that somebody would file an answer timely.

THE COURT: All right. ***

(R.21, Transcript of Proceedings on 10/29/92, pp. 45-47, Apx. pgs. 1802-1804.)

7. The Sixth Circuit Court of Appeals' Affirmance Regarding the Motion to Vacate and the Correct Conclusion that St. Paul Had No Duty to Defend

The Sixth Circuit, in reviewing the District Court's granting of St. Paul's Motion to Vacate Default Judgment, properly concluded the case presented an appropriate instance of the District Court exercising its discretion to "achieve substantial justice," *Blois v. Friday*, 612 F.2d 938, 940 (5th Cir. 1980). The Sixth Circuit concluded that St. Paul demonstrated that its default was not the result of

culpable conduct, but mistake or, at worse, excusable neglect. St. Paul's counsel did not simply ignore the pleading deadlines, but repeatedly checked with the Office of the District Court Clerk to determine whether service had been effected upon St. Paul and mistakenly relied upon the information that came from the Clerk. Neither St. Paul nor its counsel was willful in failing to respond timely. The Sixth Circuit also noted that St. Paul had a meritorious defense and Abt was not prejudiced by the vacation of the default judgment, when St. Paul moved to vacate the judgment immediately upon discovering the default, and the motion was filed less than thirty days after the date the answer of the complaint was due.

The Sixth Circuit also noted that Abt's arguments were somewhat disingenuous due to the fact that Abt's attorneys had been in frequent touch with St. Paul's attorneys prior to the initiation of the suit, but elected not to notify them of the filing of the lawsuit, the entry of default or the default judgment.

As regards to the duty to defend, the Sixth Circuit properly concluded St. Paul *and Abt* agreed that *Willoughby Hills v. Cincinnati Ins. Co.*, 459 N.E.2d 555 (Ohio 1984), controlled the case.

In *Willoughby Hills*, the Supreme Court of Ohio adopted the rule that when the pleadings, "state a claim which is potentially or arguably within the policy coverage . . . the insurer must accept the defense of the claim." *Id.* at 558.

The Sixth Circuit also cited *King v. Nationwide Ins. Co.*, 519 N.E.2d 1380, 1383 (Ohio 1988), specifically following the Ohio Supreme Court's holding that in Ohio,

normal contract rules apply to the interpretation of insurance contracts. It is for the Court to determine whether contract terms are ambiguous. *United Nat'l Ins. Co. v. SST Fitness Corp.*, 182 F.3d 447, 449 (6th Cir. 1999).

The Sixth Circuit concluded that the plain meaning of the contracts at issue precluded a finding that claims for patent infringement were covered under the policy in question. The Sixth Circuit followed its decision in *Herman Miller, Inc. v. Travelers Indemnity Co.*, 162 F.3d 454 (6th Cir. 1998), wherein the Court held that patent infringement was not arguably covered as a "advertising injury" under either "piracy" or "unfair competition." The Sixth Circuit also cited with approval the Ninth District Court of Appeals of Ohio in its decision on *Synergystex Int'l, Inc. v. Motorists Mut. Ins.*, No. 2290-M, 1994 WL 395626 (Ohio Ct. App. July 27, 1994) (*unpublished*). In *Synergystex* the Court found that the terms at issue – "infringement of copyright, title or slogan" – were not ambiguous and without the prerequisite pleading of an injury caused by advertising, no coverage of a patent infringement claim was arguable.

Therefore, the Sixth Circuit affirmed the judgment of the District Court vacating the default judgment against St. Paul, affirmed the District Court holding that St. Paul Insurance policies did not cover claims for patent infringement and also held that St. Paul had no duty to defend Mor-Flo in the patent infringement litigation.

REASONS FOR DENYING THE PETITION

1. This Case Raises No Issue of Interpretation of Federal Rule 60(b)(1) and (3), Which Warrants This Court's Review

The District Court properly granted St. Paul's Motion to Vacate Default Judgment. The Circuit Court held that the District Court did not abuse its discretion in this regard. The standards for review of granting relief from judgment are well-established, and each case is fact specific; this case raises no issue of interpretation which warrants this Court's review. Contrary to Petitioner's assertions, this ruling does not conflict with any other case, as the facts are distinguishable.

The Sixth Circuit held, St. Paul demonstrated that its default was not the result of culpable conduct, but of mistake or, at worst, excusable neglect. St. Paul's counsel did not simply ignore the pleading deadlines, but repeatedly checked with the office of the District Clerk to determine whether service had been effected, and mistakenly relied upon the information supplied by the Clerk. The failure to timely answer was an honest mistake. See *United Coin Meter Co., Inc. v. Seaboard Coastline R.R.*, 705 F.2d 839, 845 (6th Cir. 1983).

Further, although the Circuit Court did not specifically cite Civ. R. 60(b)(3), the Rule authorizes the District Court to vacate a judgment on the grounds of "misconduct of an adverse party." St. Paul based its Motion to Vacate on both Rule 60(b)(1) and Rule 60(b)(3). (R.12, Motion, p. 1; Apx. pg. 314, R.27, Memorandum and Order, p. 2; Apx. pg. 398.)

Abt's counsel do not and cannot contest that they had extensive communications with Baker as St. Paul's counsel over an extended period of time prior to the filing of suit. Despite these substantial contacts, they did not provide Baker with a courtesy copy of the complaint and omitted any reference to Baker or Weston Hurd as a counsel for St. Paul on the Civil Cover Sheet filed with the complaint, even though the form requires plaintiff's counsel provide that information (R.12, Motion, Exhibit E; Apx. pg. 385). Northern District of Ohio Rule 2:1.1 requires a "complete" form. Had counsel for Abt disclosed the information that the Civil Cover Sheet requested, of which they knew, Baker and Weston Hurd would have been of record at that time of the motion for default and would have received notice before the entry of default judgment.

By the time of the hearing on St. Paul's Motion to Vacate, Judge White had knowledge of all of the facts, including those relating to Abt's counsel's conduct, and well understood how the relevant events had unfolded. Weighing all the circumstances, he exercised his discretion to set aside the default for $15,491,016. He did not abuse his discretion.

The Circuit Court acknowledged this finding when it concluded Abt's argument for default was "somewhat disingenuous," noting Abt's attorneys had been in frequent touch with St. Paul's attorneys prior to the initiation of suit, but elected not to notify them of the filing of the lawsuit, nor the entry of default or the default judgment.

This decision was proper in all respects. As the facts and law support the propriety of vacating the default judgment, no further review is warranted.

2. The Sixth Circuit's Ruling on the Duty to Perform Does Not Conflict with *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.*, 710 N.E.2d 116 (Ohio 1999)

Interestingly, the issue before the District Court and Circuit Court regarding St. Paul's duty to defend focused on the state of the law in Ohio at the time of the filing of the Complaint concerning the policy meaning of "advertising injury." Both Abt and St. Paul *agreed* that the Ohio Supreme Court decision in *Willoughby Hills* applied to interpretation of the contract, that is, whether the facts alleged in the Complaint stated a claim that was "arguably" covered by the policy.

The Circuit Court properly concluded that the contract was *not* ambiguous, that there was no coverage for patent infringement, and therefore St. Paul owed no duty to defend.

In *Scott-Pontzer*, the Ohio Supreme Court dealt with an insurance contract that was ambiguous. *Scott-Pontzer*, 710 N.E.2d at 1117. No wonder, then, that the Circuit Court did not refer to *Scott-Pontzer* in its decision, as it had no application to the facts before the Court.

Neither the record nor the decision below raise the question presented by this petition. The Sixth Circuit has correctly applied the applicable precedent and correctly found that St. Paul had no duty to defend.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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